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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1988

FORD MOTOR CREDIT COMPANY, INC.,
Appellant,
v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF
APPEAL OF FLORIDA, FIRST DISTRICT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

The two issues set forth below arise from appellant's contention in the District Court of Appeal of Florida, First District, that Florida's intangible property tax is unconstitutional because it discriminates against interstate commerce. The Florida statute taxes both non-domiciliaries, such as appellant, on intangible assets generated from personal property sales deemed to have occurred in Florida, and Florida domiciliaries, based on their ownership of intangibles. The central ground for appellant's constitutional challenge is the potential for double taxation of the same intangible assets if other states used the same taxing formula as Florida. The Florida court's rejection of appellant's challenge raises these substantial federal questions:

1. Whether Florida's district court of appeal can create an exception to the internal consistency test promulgated by this Court that applies on a *per se* basis to intangible property taxes.
2. Whether a tax which has multiple bases for application and which potentially subjects intangible property owners engaged in interstate commerce to double taxation violates the internal consistency doctrine.

PARTIES

The parties are those named in the caption. In compliance with Supreme Court Rule 28.1, appellant states that it is a wholly-owned subsidiary of Ford Motor Company. Although there are numerous subsidiary and affiliate corporations of Ford Motor Company and Ford Motor Credit Company, including hundreds of local automobile, truck, and tractor dealerships, the only such corporation which is not wholly owned and which is publicly traded is Ford Motor Company of Canada, Limited, a subsidiary of Ford Motor Company incorporated under the laws of Canada and traded on the American Stock Exchange.

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OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, First District, which appears in the appendix hereto, at App. 1-5, *infra*, is reported at 537 So. 2d 1011 (Fla. Dist. Ct. App. 1988).

The final order of the Florida Department of Revenue, which the District Court of Appeal affirmed, is unreported. It is reprinted in the appendix hereto, at App. 6-20, *infra*.

 JURISDICTION

The decision of the District Court of Appeal of Florida, First District, hereinafter referred to as the DCA, affirming the final order of the Department of Revenue and rejecting appellant's constitutional challenge to Florida's intangible tax, was entered September 13, 1988. A timely motion for rehearing and clarification was denied on October 12, 1988.

Appellant filed a timely notice invoking the discretionary jurisdiction of the Supreme Court of Florida to review decisions of district courts of appeal which expressly declare valid a state statute or expressly construe a provision of the federal constitution. Upon consideration of jurisdictional briefs filed by the parties, the Supreme Court of Florida entered an order on February 22, 1989, declining to accept jurisdiction, denying the petition for review, and ordering that no motion for rehearing would be entertained by the Court. The time within which to docket this appeal thus runs from that order and expires on May 23, 1988. The memorandum

order of the Supreme Court of Florida is reproduced in the appendix at App. 21, *infra*.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2) (1982), as that section existed prior to the amendment enacted by Public Law 100-352 §§3, 7, 102 Stat. 662, 664 June 27, 1988, which amendment preserved unaffected the right of the Supreme Court to review, and the manner of reviewing, a judgment or decree, such as the decision of the DCA in this case, entered before the effective date of the amendment, which was September 25, 1988.

Decisions sustaining jurisdiction of this Court to review the decision on direct appeal are *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. ___, 107 S.Ct. 2829 (1987), *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984) *reh'g denied*, 469 U.S. 912 (1984) and *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. 232 (1987).

If this Court does not consider the appeal to be the proper mode of review, appellant respectfully requests that this appeal be acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. §2103 (1982). Although that section was repealed along with the repeal of 28 U.S.C. §1257(2) (1982), providing for appeal to this Court of state court decisions ruling in favor of the validity of state statutes challenged on federal constitutional grounds, the repeal did not become effective until after the entry of the decision appealed. Public Law 100-352 §§3, 7, 102 Stat. 662, 664 June 27, 1988. Nevertheless, as a precaution, and to avoid any question about this Court's continued jurisdiction to entertain this appeal or to treat it as a petition for writ of certiorari, appellant is filing,

simultaneously with this jurisdictional statement, a petition for writ of certiorari in accordance with the rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The applicable provision of the Constitution of the United States of America is:

The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .

U.S. Const. art. I, §8, cl. 3.

The relevant Florida statute is Fla. Stat. §199.112(1) (1983), which provided:

(1) All bills, notes or accounts receivable, obligations, or credits, wheresoever situated, arising out of, or issued in connection with, the sale, leasing, or servicing of real or personal property in the state are subject to taxation under this chapter, it being the legislative intent to provide that such intangibles shall be assessable regardless of where they are kept, approved as to their creation, or paid. This provision shall apply to any person representing business interests in the state that may claim a domicile elsewhere, the intent further being that no nonresident, either by himself or through an agent, transact business in the state without paying the same tax which the state would impose on residents transacting the same business. Sales of tangible personal property are in this state if the property is delivered or shipped to a purchaser within this state, regardless of the f.o.b. point or other conditions of the sale. The provisions of this section shall in no way be construed to alter the tax status of intangibles not connected with the

sale, leasing, or servicing of real or personal property in the state.¹

STATEMENT OF THE CASE

The underlying administrative proceedings were initiated following a notice of decision and final assessment by the Florida Department of Revenue for intangible taxes, interest and penalties of more than \$2 million, allegedly owed by appellant for the years 1980 through 1982. Appellant petitioned for a formal administrative proceeding and thereafter amended its petition to assert the unconstitutionality of Florida's intangible tax because it did not meet the internal consistency test imposed by decisions of this Court under the Commerce Clause of the United States Constitution. The parties agreed to submit the case for decision by the Department of Revenue based on legal memoranda and stipulated facts, the material portions of which are summarized below.

Appellant, a wholly owned subsidiary of Ford Motor Company, is a Delaware corporation which maintains its principal place of business in Dearborn, Michigan. It is qualified as a foreign corporation to do business in Florida, and has continuously maintained a registered office and agent in Florida at all material times. During the tax years 1980-1982, appellant and its parent Ford Motor Company filed corporate tax returns in Florida. Appellant maintained seven to eight branch offices employing

¹ Fla. L. 85-342 (1985) repealed §199.112. That act created §199.175, Fla. Stat. (1987), which incorporated in revised form the provisions of former §199.112.

approximately two hundred people in Florida and maintained contractual relationships with up to one hundred and fifty authorized Ford dealers in Florida. It used, or could have used, Florida's governmental agencies and courts in perfecting and protecting the intangible assets it acquired through its business in Florida.

Appellant's principal business is financing wholesale and retail sales of vehicles manufactured by Ford Motor Company and engaging in various other types of financing in Florida and other states, resulting in the creation of intangible assets representing accounts receivable. The majority of the intangibles which appellee is seeking to tax arose in connection with the purchase of tangible personal property shipped to or located in the State of Florida.

The sample legal documents and stipulated description of the manner in which the pertinent wholesale and retail intangibles were created and handled confirm the interstate character of appellant's financing business. For example, wholesale dealer financing involved the placement of vehicle orders by Ford Motor Company franchised dealers with Ford Motor Company's district sales office in Jacksonville, Florida. These orders were forwarded by this Jacksonville office to the appropriate assembly plant, none of which was located in Florida. These orders were accepted at the assembly plants by the manufacture of the particular vehicles ordered by the dealers. Payment for vehicles financed by appellant was authorized in Michigan by the dealer's attorney-in-fact, an employee of appellant, who executed the notes and other sales instruments. Then, under the dealership agreements between Ford Motor Company and its

dealers, title to a car would pass to the dealer at the assembly plant outside Florida, when delivered to the carrier. Thus, the wholesale sales of the cars were actually consummated in other states, even though the Florida statute deemed them to be sales in Florida, since the cars were shipped to Florida.

The Department of Revenue's final order rejected appellant's non-constitutional arguments against imposition of the taxes, interest and penalties. As to appellant's contention that the intangible tax is unconstitutional because it violates the Commerce Clause of the United States Constitution, the final order stated:

This tribunal is without jurisdiction to rule on this issue; however, all facts relevant thereto have been stipulated by the parties and, if appeal is taken, the appellate court can rule on this constitutional issue. *Reiss vs. Dept. of HRS*, 386 So.2d 844 (Fla. 1st DCA 1980).

On appeal to the DCA, appellant contended that Florida's intangible tax statute violated the Commerce Clause and that this Court's decisions adopting and applying the internal consistency test were controlling. The DCA explicitly ruled on the Commerce Clause issue by holding:

We find that Chapter 199, Florida Statutes, the Intangible Personal Property Tax Act, as applied to appellant, does not violate the Commerce Clause of the United States Constitution, and we affirm the order appealed.

The opinion expressly acknowledged that Florida's intangible tax applied to both "intangible property owned by a domiciliary corporation, regardless of business situs", and to intangibles resulting from "the sale,

leasing, or servicing of real or personal property in this state" The DCA nevertheless rejected appellant's argument "that these multiple bases for taxation impermissibly burden interstate commerce." The court held, based on tax cases decided by this Court under the Due Process Clause, that each state into which appellant extends its activities regarding its intangibles, thereby availing itself of the benefits of the laws of those states, may impose a tax on such intangible property. The court effectively equated the Due Process and Commerce Clauses by reasoning that decisions of this Court have "indicated that taxes which satisfy the due process clause generally will satisfy the commerce clause."

As to appellant's contention that the internal consistency test should be applied, the court observed that the test has thus far been applied only to income, franchise and excise taxes, and that this Court "has long distinguished property taxation from the taxation of interstate business activities through excise and income taxes." The DCA concluded that the internal consistency test did not apply to a property tax, and therefore held that Florida's intangible tax did not discriminate against interstate commerce in a manner offensive to the Commerce Clause.

Appellant filed a timely motion for rehearing and clarification. Following the DCA's denial of that motion, appellant invoked the discretionary jurisdiction of the Supreme Court of Florida to review decisions of district courts of appeal that expressly declare valid a state statute or expressly construe a provision of the state or federal constitution. After considering jurisdictional briefs, the Supreme Court of Florida declined to exercise

its discretionary jurisdiction, whereupon appellant timely filed, in the DCA, its notice of appeal to this Court.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The DCA held that Florida's intangible tax need not satisfy the internal consistency test to survive Commerce Clause scrutiny. This holding, if permitted to stand, would profoundly curtail the effectiveness of this Court's adoption of a consistent rule which can be easily and broadly applied to answer the oft-repeated question: Does a particular state taxing statute impermissibly restrict the free flow of commerce among the states, contrary to the constitution? To maintain the clarity and vitality of the internal consistency test, this Court should once again turn to its continuing obligation of "[d]efining the limits that the Commerce Clause places on the taxing power of the states." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977).

The internal consistency test had its inception in *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983), *reh'g denied*, 464 U.S. 909 (1983), in which this Court ruled that compliance with the Due Process and Commerce Clauses requires that a state corporate franchise tax employing a unitary business principle must apply a "fair" formula to apportion the income of that business within and without the state. To be "fair" the apportionment formula must have "internal consistency" – that is, "the formula must be such that if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed." *Id.* at 169.

Thus the plain purpose of the rule is to eliminate exposure to multiple state taxes which burden interstate commerce.

This Court has since applied the internal consistency test to resolve Commerce Clause challenges to various forms of state taxation. In *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), this Court applied the test to strike down West Virginia's statute which taxed unapportioned gross receipts from goods sold in interstate commerce to customers located in West Virginia, but which exempted local manufacturers from the tax. This Court ruled that the West Virginia tax scheme failed the internal consistency test and thus discriminated against interstate commerce by imposing a risk of multiple taxation. Based on the internal consistency test, this Court rejected West Virginia's contention that the taxpayer was required to prove that taxes imposed by other states had actually resulted in an increased tax burden on taxpayers engaged in interstate commerce. *Id.* at 644.

In *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. ___, 107 S.Ct. 2829 (1987), this Court applied the internal consistency test to strike down lump sum annual taxes imposed by the State of Pennsylvania on trucks using its highways. This Court determined that Pennsylvania's axle tax

has a forbidden impact on interstate commerce because it exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the state that enacted the measure rather than 'among the several states' U.S. Const., Art I, §8, cl 3.

Id., 107 S.Ct. at 2842. In *Tyler Pipe Industries v. Washington Department of Revenue*, 483 U.S. 232 (1987) decided on the same date as *Scheiner*, this Court again followed *Armco*

and applied the internal consistency test in holding that a manufacturing tax imposed by the State of Washington only on in-state goods sold to out-of-state purchasers discriminated against interstate commerce in violation of the Commerce Clause.

If, as assumed by the internal consistency test, other states followed Florida's taxing scheme, a single intangible asset owned by appellant could be taxed by as many as three states. During the years in issue, the Florida statute provided that sales of tangible personal property were deemed Florida sales for purposes of the intangible tax if the tangible property was delivered or shipped to a purchaser in Florida, "regardless of the f.o.b. point or other conditions of sale." Fla. Stat. §199.112(1) (1983). The statute makes no provision for treating a sale that actually occurs in Florida as a non-Florida sale if the sale contemplates the subsequent shipment of the goods outside Florida, and the Department of Revenue recognizes no such distinction. This provision results in a tax not only on intangibles arising out of sales which are actually consummated in Florida according to the general law of sales, but also on intangibles generated by sales consummated in other states, which are statutorily deemed to be Florida sales because personal property is delivered or shipped to a purchaser in Florida. If all other states had the same taxing scheme as Florida, the same intangible asset could be taxed up to three times - once by the owner's state of domicile, once by the state where the underlying sale of personal property actually occurred, and once by the state to which the underlying personal property was delivered or shipped.

The potential for at least double taxation of every intangible is obvious, because the Florida statute imposes "a tax on intangible property owned by a domiciliary corporation, regardless of business situs." *Ford Motor Credit*, 537 So. 2d at 1012, citing, *Florida Steel Corp. v. Dickinson*, 328 So. 2d 418 (Fla. 1976). Thus, if Michigan, appellant's commercial domicile, had the same taxing scheme as Florida, all intangibles owned by appellant would be taxed there. Where, as in this case, some of those same intangibles were generated as a result of sales of personal property in Florida, they would also be taxed by Florida.

The present case thus falls squarely within the rule of *Armco* and its progeny. If all other states used the same multiple bases for taxing intangibles as Florida, taxpayers engaging in interstate commerce like appellant would be subjected to more than one unapportioned tax on the full value of the same intangible asset, while taxpayers who confined their business to one state would pay only one tax. The DCA below nevertheless declined to put Florida's intangible tax to the internal consistency test, even though it acknowledged that this Court had adopted and applied the test in cases involving state income, franchise, and excise taxes. If the Florida Statute had been subjected to the test, it would have failed.

The DCA rejected appellant's constitutional challenge through reasoning wholly inconsistent with this Court's decisions defining the limits which the Commerce Clause places on the taxing power of the states. First, the DCA held that because appellant "has extended its activities regarding its intangibles to Florida and has availed itself of the benefits of the laws of several states

with regard to the property, those several states, including Florida, may each impose a tax upon such intangible property." *Ford Motor Credit*, 537 So. 2d at 1012, citing *State Tax Comm'n v. Aldrich*, 316 U.S. 174 (1942) and *Curry v. McCanless*, 306 U.S. 357 (1939). Second, while the DCA recognized that both *Curry* and *Aldrich* involved Due Process challenges, it nevertheless accepted those cases as authority for rejecting the Commerce Clause challenges as well. The court justified applying the Due Process rule to a Commerce Clause case based on its view that:

[T]he Supreme Court has indicated that taxes which satisfy the due process clause generally will satisfy the Commerce Clause.

Ford Motor Credit, 537 So. 2d at 1012, citing, *Ott v. Miss. Valley Barge Line Co.*, 336 U.S. 169 (1949), *Ford Motor Co. v. Beauchamp*, 308 U.S. 331 (1939), and *Pac. Tel. & Tel. Co. v. Tax Comm'n*, 297 U.S. 403 (1936).

Third, the DCA held that Florida's intangible tax is not "integrally related to interstate commerce" and that the effect on appellant's interstate activities is only "incidental and indirect," citing, *American Manufacturing Co. v. St. Louis*, 250 U.S. 459, 464 (1919). Fourth and finally, the DCA rejected application of the internal consistency test based solely on its view that this Court draws a distinction between property taxes and excise taxes in Commerce Clause cases, and that:

We find no suggestion in the Court's internal consistency cases that it would invade this longstanding distinction, or apply the internal consistency test in the property tax context. We therefore decline to extend the application of this test to Florida's intangible property tax.

The DCA's four-part reasoning is seriously flawed, for the cited decisions of this Court do not support either the rejection of appellant's Commerce Clause challenge to the Florida statute or the inapplicability of the internal consistency test. Moreover, the defective rationale of the decision below places a cloud of doubt around this Court's efforts to formulate a consistently practical test for resolving Commerce Clause issues arising from a wide range of state taxes.

While Due Process and Commerce Clause validity of state taxes may be coincidental in some circumstances, this Court has never broadly equated the two, as the DCA seems to have believed. The three cases cited by the DCA on this point – *Ott*, *Beauchamp*, and *Pacific Telephone* – all involved state taxes apportioned between the taxing state and other states to which the subject of the tax could be attributed. The *Ott* decision illustrates both the similarity and differences between Due Process and Commerce Clause considerations in such circumstances. *Ott* involved *ad valorem* property taxes levied by Louisiana and New Orleans on the taxpayer's barges, apportioned according to a ratio between the total number of miles of the taxpayer's barge lines in Louisiana and the total number of miles on the entire line. *Id.* at 171. This Court's opinion summarized and compared the Commerce Clause and Due Process considerations applicable to this apportioned tax:

The problem under the Commerce Clause is to determine "what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions." . . . So far as due process is concerned the only question is whether the tax in

practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State.

Id. at 174 (citations omitted). While the above holding suggests a similarity between Due Process and Commerce Clause considerations in testing the validity of an apportioned tax, it does not support the DCA's apparent holding that if a non-apportioned tax is valid for purposes of Due Process, it also passes muster under the Commerce Clause.

The non-identity of Due Process and Commerce Clause issues in testing the validity of state taxes is evident from the four-pronged test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), *reh'g denied*, 430 U.S. 976 (1977), under which a tax can withstand a Commerce Clause challenge when it "is applied to an activity with a substantial nexus with a taxing state, is fairly apportioned, does not discriminate against interstate commerce and is fairly related to the services provided by the state." *Id.* at 279. That test, which has since been applied to a wide variety of taxes, contains requirements unrelated to any Due Process inquiry.

One reason the Florida tax does not meet the *Complete Auto* test is that the statute makes the tax non-apportionable. The full value of the intangible asset is deemed to have a Florida taxing situs if the owner is domiciled in Florida or if the intangible asset results from a sale of tangible property in Florida. By statutory contrivance, such Florida sales include transactions where

the sale actually occurs in some other state (i.e. "regardless of the f.o.b. point . . . ") but the property is delivered or shipped to Florida. Fla. Stat. §199.112(1) (1983).

A second reason Florida's tax does not comply with *Complete Auto* is that it discriminates against interstate commerce. The purpose of the internal consistency test is to detect such discrimination. The DCA, in purporting to adhere to the principle that a state tax is invalid if it "discriminates against interstate commerce by affording an undue advantage to local business," and in concluding that the Florida tax does not burden interstate commerce, spurned the one tool designed by this Court to resolve such questions.

If the internal consistency test is applied here, the prohibited interference with interstate commerce is self evident. Contrary to the DCA's holdings, the Florida tax is "integrally related to interstate commerce" and does afford an undue advantage to local business.

The statute is specifically designed to reach not only Florida domiciliaries but also non-domiciliaries who generate intangible assets from sales in Florida and from sales in other states involving shipment of property into Florida. By its very nature, this tax on intangibles of non-domiciliaries is integrally related to interstate commerce.

The potential for a double or even triple tax on the same intangible asset can exist only as against taxpayers engaged in interstate commerce. Those taxpayers who confine their business activities to their Florida domicile run no risk of a multiple tax burden on a single intangible asset. The Florida tax thus discriminates against interstate commerce by "providing a direct commercial advantage

to local business." *Bacchus Imports, Ltd. v. Diaz*, 468 U.S. 263, 268 (1984), quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. at 329 and *Northwestern Cement Co. v. Minn.*, 358 U.S. 450, 458 (1959).

The decisive question which appellant will ask this Court to decide is whether its internal consistency test applies to resolve Commerce Clause challenges to state intangible property taxes. The DCA held that the test did not apply, only because the challenged tax was a property tax, not an excise or income tax such as those involved in this Court's prior decisions invoking the internal consistency test.

The DCA cited two decisions of this Court in attempting to distinguish between property and excise taxes for Commerce Clause purposes: *Mobil Oil Corp v. Commissioner of Taxes*, 445 U.S. 425 (1980), and *Pullman's Palace Car Co. v. Commonwealth of Pennsylvania*, 141 U.S. 614 (1891). Neither case supports a conclusion that the internal consistency test does not apply to property taxes.

Mobil Oil, decided several years before formulation of the internal consistency test, involved Due Process and Commerce Clause challenges to an apportioned corporate income tax imposed by Vermont on non-domiciliary corporations doing business in Vermont. The distinction between property taxes and excise or income taxes was drawn by this Court for the limited purposes of distinguishing certain property tax cases on which the taxpayer relied. Among various other grounds for rejecting the taxpayer's analogies and arguments, this Court observed that "the factors favoring use of the allocation method in property taxation have no immediate applicability to an

income tax." *Id.* at 448. Nothing in that statement or elsewhere in *Mobil Oil* supports the DCA's view that property taxes are for some undefined reason exempt from the internal consistency test or similar Commerce Clause inquiries.

The DCA's reliance on *Pullman's Palace Car* as a basis for the property tax-excise tax distinction is equally tenuous. That case involved a property tax apportioned according to the percentage of miles the taxpayer's railroad cars were run within and outside the taxing state. In upholding the tax, this Court distinguished between state license taxes on the privilege of carrying on interstate commerce, which are prohibited as a burden on commerce, and permissible taxes on personal property located within the taxing state. The validity of the property tax was confirmed however, only because the state had used a just and equitable method of apportionment. The Court reasoned that if the same method were "adopted by all the States through which these cars ran, the Company would be assessed on the whole value of its Stock, and no more." *Id.* at 617-618.

This holding demonstrates that there is no valid distinction between license taxes and property taxes for Commerce Clause purposes where, as here, an unapportioned property tax has a prohibited effect on interstate commerce. In fact, *Pullman's Palace Car* adopts an early forerunner of the internal consistency test and applies it to an apportioned property tax. The decision thus refutes the distinction drawn by the DCA and supports appellant's contention that a property tax is not exempt from the requirement of internal consistency.

The problem addressed by the internal consistency test is the prospect of multiple state taxation which tends to restrict interstate commerce by exposing those who engage in it to a greater tax burden than those who confine their activities to their home state. That problem does not depend on whether it is an excise tax or property tax that restricts the free flow of commerce – either is equally capable of having the forbidden effect.

Nothing in any of this Court's internal consistency decisions indicates that the test should not apply with equal force to any state tax which impinges on interstate commerce. Prior decisions pitting state taxes against the Commerce Clause refute any notion that there is such a fundamental difference between property taxes and excise or income taxes that different rules must be devised to test their validity under the Commerce Clause.

In *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), this Court reaffirmed that its goal in reviewing Commerce Clause challenges to state taxes has been to " 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.' " *Id.* at 615, quoting *Mobil Oil*, 445 U.S. at 443. If, as here, the practical effect of an intangible property tax is to restrict interstate commerce, it would be neither consistent nor rational to follow a different rule than that applicable to excise taxes which have the same effect.

In dealing with Commerce Clause challenges to state taxes, this Court has guarded against multiple taxation of interstate operations, which offends the Commerce Clause, where a tax on property is involved. *Central R. Co. of Pa. v. Commonwealth of Pennsylvania*, 370 U.S. 607,

612 (1962), citing, *Standard Oil Co. v. Peck*, 342 U.S. 382, 385 (1952). *Central Railroad* in fact foretold the internal consistency test when it held:

Since the domiciliary State is precluded from imposing an ad valorem tax on any property to the extent that it *could* be taxed by another State, not merely on such property as *is* subjected to tax elsewhere, the validity of Pennsylvania's tax must be determined by considering whether the facts in the record disclose a possible tax situs in some other jurisdiction.

Id. at 614. (Emphasis in original).

The DCA's opinion undertakes to create, without any clear analysis or direct authority, a broad "property tax" exception to the internal consistency test adopted by this Court. State taxpayers and taxing authorities alike need and deserve the authoritative guidance of this Court on the important issue at stake.

The substantial nature of the question here has recently been emphasized by the publication of a major law review article by one of the nation's leading commentators in this area of the law: W. Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich.L.Rev. 138 (1988). In that article, which apparently went to press shortly before the DCA's decision was released, the author addresses independently the exact issue in this case and reaches a conclusion directly opposite that of the DCA:

One final example of an existing taxing scheme that appears to violate the "internal consistency" principle is Florida's intangible property tax. The tax is imposed at a rate of one mil (\$1 per \$1,000) on all intangible property, except for obligations secured by

Florida realty. As construed by the Florida courts, the tax applies to intangible property owned by taxpayers domiciled in the state, whether or not the property has acquired a business situs in Florida, as well as to intangible property owned by taxpayers domiciled outside of Florida when the property has acquired a business situs in the state.

Id. at 162. Professor Hellerstein goes on to note that Florida has followed this Court's interpretation of the Due Process Clause as not preventing two states from taxing the same intangible property, but questions whether such a tax is valid under the Commerce Clause as expressed in the internal consistency principle. He states:

If every state adopted an intangible property tax that applied both to property owned by its domiciliaries and to property with a business situs in the state, the enterprise domiciled in one state but employing intangible property in another, where it acquires a business situs, would pay two taxes on its intangibles whereas its wholly intrastate competitor would pay but one tax. Assuming that the Court would have little difficulty in concluding that such interference with interstate capital flows affected commerce so as to warrant commerce clause scrutiny, the "impermissible interference with free trade" under the "internal consistency" doctrine would be self evident.

Id. at 162-163. Those views so contrary to the decision of the DCA, expressed by such a recognized authority in his field, provide another cogent reason why the questions presented here are so substantial as to require plenary consideration of this Court, with briefs on the merits and oral argument.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

FORD MOTOR CREDIT COMPANY,	* NOT FINAL UNTIL
Appellant,	TIME EXPIRES TO FILE
vs.	* REHEARING MOTION
	AND DISPOSITION
	* THEREOF IF FILED.
DEPARTMENT REVENUE,	* CASE NO. 87-2036
STATE OF FLORIDA,	
Appellee.	*
	*

Opinion filed September 13, 1988.

An Appeal from an order of the Department of Revenue.

James E. Tribble, of Blackwell, Walker, Fascell & Hoehl,
Miami, for appellant.

Jeffrey M. Dikman and J.C. O'Steen, Assistant Attorneys
General, for appellee.

WENTWORTH, J.

Appellant seeks review of a final agency order holding that appellant owes specific amounts for underpaid intangible taxes, penalties, and interest for the years 1980-1982. We find that Chapter 199, Florida Statutes, the Intangible Personal Property Tax Act, as applied to appellant, does not violate the commerce clause of the United States Constitution, and we affirm the order appealed.

Ford Motor Credit Company (FMCC) is a Delaware corporation whose principal place of business is in Michigan. FMCC is authorized to do business in Florida under Chapter 607, Florida Statutes, and maintains branch

offices in the state. FMCC's principal business is financing the wholesale and retail sales of vehicles manufactured by Ford Motor Company, of which FMCC is a wholly owned subsidiary. FMCC applications for credit are submitted to FMCC Florida branch offices, which undertake the financial investigations of borrowers. In wholesale transactions, the FMCC Michigan office approves lines of credit and authorizes draws against dealers' accounts. FMCC Florida branch offices send original retail financing contracts to the FMCC Michigan office for storage. The FMCC Michigan office instructs FMCC Florida branch offices regarding banking transactions.

During the years 1980-1982, FMCC filed corporate tax returns and paid taxes due. In 1983, Florida's Department of Revenue (DOR) audited FMCC's intangible tax returns for the years 1980-1982, and proposed an assessment of tax, penalties, and interest.¹ FMCC filed a timely protest and requested a formal hearing. On the basis of a revised audit report, DOR imposed the intangible tax and delinquent and undervalued property penalties. DOR offered abatement of the undervalued property penalty, which FMCC declined. An administrative hearing officer rejected appellant's contention that Florida's intangible property tax unfairly burdens its interstate transactions, and recommended an assessment of taxes, interest and penalties. DOR entered its final order, adopting virtually verbatim the recommended order.

¹ The majority of the intangibles in question were accounts receivable by FMCC and owed by Florida debtors in connection with the purchase of tangible personal property shipped to or located in Florida.

Appellant contends that application of Florida's intangible tax to its transactions violates the commerce clause by potentially exposing appellant to multiple taxation on the same intangibles. Between 1980 and 1983 section 199.112(1), Florida Statutes, provided that:

All bills, notes or accounts receivable, obligations, or credits, wheresoever situated, arising out of, or issued in connection with, the sale, leasing, or servicing of real or personal property in the state are subject to taxation. . . . This provision shall apply to any person representing business interests in the state that may claim a domicile elsewhere. . . . Sales of tangible personal property are in this state if the property is delivered or shipped to a purchaser within this state. . . .

Chapter 199, Florida Statutes, also provided for a tax on intangible property owned by a domiciliary corporation, regardless of business situs. *See Florida Steel Corp. v. Dickinson*, 328 So.2d 418 (Fla. 1976). Appellant contends that these multiple bases for taxation impermissibly burden interstate commerce. But since appellant has extended its activities regarding its intangibles to Florida and has availed itself of the benefits of the laws of several states with regard to this property, those several states, including Florida, may each impose a tax upon such intangible property. *See State Tax Commission v. Aldrich*, 316 U.S. 174 (1942); *Curry v. McCanless*, 307 U.S. 357 (1939); *Dickinson*, *supra*. While both *Curry* and *Aldrich* concerned due process challenges, the Supreme Court has indicated that taxes which satisfy the due process clause generally will satisfy the commerce clause. *See Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949); *Ford Motor Co. v.*

Beauchamp, 308 U.S. 331 (1939); *Pacific Telephone & Telegraph Co. v. Tax Commission*, 297 U.S. 403 (1936). The contested intangible tax in the present case is not integrally related to interstate commerce and, although it may affect appellant's interstate activities, it produces "only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other and general contribution to the cost of government." *American Manufacturing Co. v. St. Louis*, 250 U.S. 459, 464 (1919).

Appellant nevertheless contends that its interstate activities would be unfairly burdened by multiple taxation if every other state were to adopt Florida's taxing scheme. By this argument appellant seeks application of the internal consistency test for commerce clause analysis, as propounded in *Container Corp. v. Franchise Tax Board*, 463 U.S. 159 (1983). This test requires that a tax have "what might be called internal consistency – that is, the formula must be such that, if applied by every jurisdiction," there would be no impermissible interference with free trade. *Id.* at 169. However, *Container Corp.* was a franchise tax case, involving the apportionment of a tax to reflect the proportion of business conducted within a state. Since *Container Corp.* the test has been applied only to franchise and excise taxes. See *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. ___, 107 S.Ct. 2829 (1987); *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. ___, 107 S.Ct. 2810 (1987); *Armco Inc. v. Hardesty*, 467 U.S. 63 (1984). The United States Supreme Court has long distinguished property taxation from the taxation of interstate business activities through excise and income taxes. See e.g., *Mobil Oil Corp. v. Commissioner*

of Taxes, 445 U.S. 425, 448 (1980); *Pullman's Palace – Car Co. v. Commonwealth*, 141 U.S. 18 (1891). We find no suggestion in the Court's internal consistency cases that it would invade this longstanding distinction, or apply the internal consistency test in the property tax context.² We therefore decline to extend the application of this test to Florida's intangible property tax.

In reaching this decision, we adhere to the principle that under the commerce clause no state may impose a tax which discriminates against interstate commerce by affording an undue advantage to local business. See *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). We find that Florida's intangible property tax, as applied to appellant, does not have this prohibited effect. While the tax may impact appellant's activities in interstate commerce, it does not impermissibly burden such activities and is consistent with the commerce clause of the United States Constitution.

We affirm the order appealed.

SMITH, C.J., and WIGGINTON, J., CONCUR.

² See generally, Justice Scalia's dissent in *Tyler Pipe*, *supra*, and Justice O'Connor's and Justice Scalia's dissents in *American Trucking*, *supra*.

STATE OF FLORIDA, DEPARTMENT OF REVENUE
TALLAHASSEE, FLORIDA

FORD MOTOR CREDIT CORPORATION,)	
)	
Petitioner,)	CASE NO. 85-1303
)	
v.)	
)	
DEPARTMENT OF REVENUE, STATE OF FLORIDA,)	
)	
Respondent.)	
)	

FINAL ORDER OF THE DEPARTMENT OF REVENUE

This Cause came on before the Governor and Cabinet, sitting as the Head of the Department of Revenue, at their regular meeting on November 17, 1987.

Ford Motor Credit Company (FMCC), Petitioner, instituted this administrative procedure to challenge the Department of Revenue (DOR) imposition of intangible property taxes, interest, and penalties for the tax years 1980 through 1982. This case was initially scheduled for hearing commencing October 1, 1985, but was continued at the request of the parties who were attempting to resolve the dispute, and was rescheduled to be heard August 5, 1986. Prior to that date, the parties agreed to waive hearing, stipulate to all relevant facts, and submit briefs and legal memoranda supporting their respective positions, with initial briefs by February 20 1987 and simultaneous submission of reply briefs by March 4, 1987.

Petitioner is represented by Martin J. Kurzer, Esquire, Blackwell, Walker, Fascell & Hoehl, One Southeast Third Avenue, Miami, Florida 33131.

Respondent is represented by Linda Lettera, Esquire, and J.C. O'Steen, Esquire, Department of Legal Affairs, Office of the Attorney General, The Capitol, Tallahassee, Florida 32301.

Findings of fact are those stipulated to by the parties in the prehearing stipulation. Exhibits referred to are those attached to the prehearing stipulation.

FINDINGS OF FACT

1. FMCC is a corporation organized and existing under Delaware law. FMCC maintains its principal place of business in Dearborn, Michigan. FMCC is a wholly owned subsidiary of Ford Motor Company.

2. FMCC qualified and is authorized to do business in the State of Florida pursuant to the foreign corporation provisions of Chapter 607, *Florida Statutes*, and has continuously maintained a registered office and agent in this state during the audit years at issue.

3. During the tax years 1980-1982, inclusive, FMCC and Ford filed corporate tax returns in Florida and paid the taxes due thereon under the Florida Income Tax Code; FMCC maintained 7 to 8 branch offices and employed approximately 200 people in Florida; and Ford had contractual relationships with approximately 130 to 150 authorized Ford dealers in Florida. A copy of a representative agreement between Ford and the dealers was Exhibit 3 to the Stipulation.

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4. FMCC's principal business is financing the wholesale and retail sales of vehicles manufactured by Ford Motor Company. During the audit period FMCC provided financing for the purchase of vehicles as authorized by Ford dealers from Ford Motor Company. FMCC also: provided financing for the purchase of automobiles by the public from the dealers; and engaged in commercial, industrial and real estate financing, consumer loan financing, and leasing company financing in the State of Florida as well as other states. Attached as Composite Exhibit 4 were sample documents utilized by FMCC in the above financing.

5. The majority of the intangibles in question are accounts receivables held by FMCC and owned by Florida debtors in connection with the purchase of tangible personal property shipped to or located in the state of Florida.

6. FMCC is the holder of security agreements executed by thousands of Florida debtors. These security agreements gave FMCC a lien on tangible personal property located in the State of Florida. The Florida Secretary of State's office was utilized by FMCC during the assessment period to perfect and protect its liens created under these security agreements with Florida debtors by the filing of U.C.C. financing statements. None of the original notes are stored in Florida.

7. During the assessment period, FMCC utilized or could have utilized the Florida Courts to recover sums due by Florida debtors on delinquent accounts receivable. In addition, FMCC utilizes the Florida Department of

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Highway Safety and Motor Vehicles to perfect its liens on motor vehicles pursuant to Chapter 319, *Florida Statutes*.

8. In 1983, the Department conducted an audit of the FMCC intangible tax returns for tax years 1980 through 1982, inclusive. On June 3, 1983, the Department proposed an assessment of tax, penalty and interest in the total amount of \$2,560,379.00. See Exhibit 5. FMCC filed a timely protest.

9. On October 8, 1984, the Department issued a Notice of Decision. See Exhibit 2. On December 12, 1984, the Department acknowledged receipt of FMCC's timely November 8, 1984 Petition for Reconsideration. On February 18, 1985, the Department issued a Notice of Reconsideration. See Exhibit 6.

10. FMCC elected to file a Petition for Formal Proceedings, which was received on April 8, 1985.

11. On the basis of the revised audit report, the Department of Revenue imposed the intangible tax on FMCC for the tax years 1980 through 1982, inclusive, in the following categories, and in the taxable amounts listed as follows:

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		<u>1/1/80</u>	<u>1/1/81</u>	<u>1/1/82</u>
(1)	Commercial Finance Receivables— Retail *	\$342,892,615	\$403,061,571	\$486,412,164
(2)	Commercial Finance Receivables— Wholesale *	218,591,180	241,993,462	228,303,569
(3)	Simple Interest Lease Receivables— Retail *	66,345,902	75,978,095	71,315,777
(4)	Lease Finance Receivables *	N/A	N/A	N/A
(5)	Capital Loan Receivables *	3,112,877	2,064,698	2,419,770
(6)	Consumer Loan Receivables	10,144,531	14,122,666	18,578,699
(7)	Service Equipment Financing— Dealer I.D. Receivables	481,869	368,186	422,108
(8)	Ford Rent-A-Car Receivables **	27,825,283	26,179,377	20,362,896
(9)	Ford Parts & Service Receivables *	—0—	10,499,401	10,800,313
(10)	Accounts Receivables — Customers & Others	3,452,194	4,581,629	4,952,234
(11)	Accounts Receivables — Affiliates	1,617,880	2,914,094	4,438,849
(12)	C.I.R. Receivables **	<u>23,243,257</u>	<u>27,387,938</u>	<u>24,222,621</u>
	TOTAL FLORIDA RECEIVABLES -----	697,707,588	809,151,117	872,229,000
	TAX AT 1 MILL -----	697,708	809,151	872,229
	LESS ORIGINAL TAX PAYMENT -----	312,703	351,976	339,142
**	LESS PETITION PAYMENT ON AGREED CATEGORIES -----	51,069	53,567	44,586
	TOTAL REMAINING TAX ASSESSED -----	\$ 333,936	\$ 403,608	\$ 488,501
***	TOTAL TAX FOR ALL YEARS -----	\$ 1,226,045		
*	REVISED ASSESSMENT FIGURES			
***	DOES NOT INCLUDE \$1,386.18 OF THE PETITION PAYMENT			

12. At the time it filed its petition for a formal hearing, FMCC agreed to and paid the 1 mill tax, but no interest or penalty, on the following amounts. The taxability of these items is no longer in dispute, only penalty and interest.

	<u>1980</u>	<u>1981</u>	<u>1982</u>
(8) Ford Rent-A-Car Receivables	27,825,283	26,179,377	20,362,896
(12) CIR Receivables	23,243,257	27,387,938	24,222,621

13. Capital Loan Receivables (item 5 of paragraph 11) reflect amounts of money owed by Ford dealers to FMCC. The obligation arises from loans made to Ford dealers located in Florida to expand showroom or other facilities and for working capital.

14. The items located as (10) Accounts Receivable - Customers and Others and (11) Accounts Receivables - Affiliates in paragraph 11 reflect only the amount of accrued interest to which FMCC is entitled on notes from non-affiliates and affiliates, respectively, from the last settlement date prior to year end until the end of each respective year. The principal amounts owed on these notes, which are not secured by realty, are included in other categories. The Department does not assess a tax for similar interest when the amount owed is secured by realty.

15. Wholesale and retail intangibles were created and handled in 1980, 1981 and 1982 by FMCC in the manner set forth in Exhibit 7.

16. The Department of Revenue has imposed penalties in the amount of \$543,968 composed of \$330,051 as

the 25% delinquent penalty imposed pursuant to *Fla. Stat.* Section 199.052(9)(a) (1983), and \$15,886 as the 15% undervalued Property penalty imposed pursuant to Section 199.052(9)(d) (1983), *Florida Statutes*. The Department offered abatement of the 15% omission penalty (\$198,031) imposed pursuant to *Fla. Stat.* Section 199.052(9)(c) (1983). The closing agreement required pursuant to *Fla. Stat.* Section 213.21 reflecting this reduction of penalty was not signed by petitioner.

17. FMCC's intangible tax returns have been audited on prior occasions. The manner of reporting was identical to the manner in which FMCC reported its intangibles for tax years 1980 through 1982. The 1973-1975 and the 1976-1978 audits were "no change" audits. FMCC's method of reporting receivables generated from Florida sales was challenged by the Department of Revenue. The challenge was dropped because the Department of Revenue did not have the statutory authority to assess sales of tangible personal property with an f.o.b. point other than Florida. Chapter 77-43, Laws of Florida amended Section 199.112, *Fla. Stat.* to allow tangible personal property (sic) [to be taxed] regardless of the f.o.b. point of sale. This amendment applied to the January 1, 1978 taxable year. There was a 1978-1980 "no change" audit.

18. Ford Motor Company has filed refund claims for certain categories for the tax year 1981 and 1982. Ford Motor Company claims that it inadvertently paid intangible tax on accounts receivable owned by FMCC. As presented in the Notice of Decision, no refund will be made as it will be handled as a credit against taxes due by Ford Motor Company.

19. While not an announced policy, the Department of Revenue drafted and utilized proposed rules relating to compromising penalties. These rules are not final. Attached as Exhibit 8 were the proposed rules. A copy of these rules was provided to Petitioner by letter dated July 28, 1986. In addition, while not an announced policy the Department of Revenue utilized guidelines established by the Internal Revenue Service and federal court for compromising penalties.

CONCLUSIONS OF LAW

The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings.

Petitioner presents six basic premises for relief which will be discussed seriatim.

First, Petitioner contends the intangible tax law is unconstitutional with its attack focused on Section 199.112, *Florida Statutes*. This tribunal is without jurisdiction to rule on this issue; however, all facts relevant thereto have been stipulated by the parties and, if appeal is taken, the appellate court can rule on this constitutional issue. *Rice vs. Dept. of HRS*, 386 So.2d 844 (Fla. 1st DCA 1980). Petitioner's position that these intangibles may not be taxed by Florida because FMCC does not have a business situs in this state is contrary to the decision rendered in *Allis Chalmers Credit Corp. vs. Dept. of Revenue*, 456 So.2d 899 (Fla. 1st DCA 1984). Under the principles announced in *Allis Chalmers*, FMCC clearly has a business situs in this State and those intangibles held

outside Florida on property located or sold in Florida are taxable.

Next, Petitioner contends that the business situs test of Section 199.112 would, under many conditions, allow for the same intangible to be taxed by two states if both have intangible tax laws like those of Florida. This is alleged to unfairly tax interstate transactions, but Petitioner does not contend in this argument that this is unconstitutional – only that it is unfair. This position is without merit. *Curry vs. McCanless*, 307 U.S. 357, 359 S.Ct. 900 (1939); *State Tax Commission vs. Aldrick*, 316 U.S. 174, 625 S.Ct. 1008, 86 L.Ed. 1358 (1942).

Petitioner next contends that Department of Revenue cannot properly tax accrued interest on accounts receivable for: (a) customers and others and (b) affiliates, because these receivables do not reflect a principal amount owed FMCC. Petitioner relies upon Rule 12C-2.10(3), Florida Administrative Code, which provides:

The fair market value of a note is presumed to be the amount of the unpaid principal as of January 1 of each year.

This, FMCC contends, allows only the principal represented by the notes and not accrued interest to be taxed. Since the notes are elsewhere subjected to the intangible property tax, FMCC contests only the tax on the accrued interest. Section 199.023(1), *Florida Statutes*, defines "intangible personal property" to mean:

All personal property which is not in itself intrinsically valuable but derives its chief value from that which it represents, . . .

The account labeled "accrued interest" is an asset of FMCC, is intangible property, and, as such, is taxable under the definition of intangible personal property above quoted. FMCC's reliance on the rule is misplaced. The rule creates only a presumption that the fair market value of the note is the unpaid principal as of January 1. If interest is also payable on this note, and this interest has accrued, this obviously increases the fair market value of the note by the value of the accrued interest or in direct proportion to the value of this accrued interest.

Next, FMCC contends Department of Revenue cannot tax capital loan receivables. With respect to these receivables secured by mortgage on real property both parties concur that those are not subject to an intangible tax. These capital loan receivables are loans made to Ford dealers to expand their showrooms or other facilities and for working capital. FMCC's interpretation of Section 199.112 that this section subjects to taxation only intangibles "arising out of, or issued in connection with, the sale, leasing or servicing of real or personal property" in Florida and since those are capital loans to improve showrooms, etc., there is no sale, lease or servicing of property and hence no authority to tax, is much too strict. Notes representing these loans are intangible personal property and it can hardly be said they were unrelated to the sale of Ford products. Thus, they did arise out of "the sale . . . or servicing of . . . personal property" in Florida.

FMCC next contends that DOR is barred from assessing interest and penalties because it failed to comply with the legislative mandate in Section 213.21(5) to promulgate rules establishing guidelines for informal conferences and for settling the taxpayer's liability for any tax, penalty or

interest assessed as provided by Chapter 199, *Florida Statutes*. Section 213.21 authorizes DOR to establish informal procedures to resolve disputes relating to the assessment of taxes, interest and penalties and subsection (5) thereof provides:

The department shall establish by rule guidelines and procedures for implementation of this section.

FMCC's contention that the failure of DOR to comply with this mandate requires dismissal of taxes, penalties and interest is without merit. Also without merit is the position that penalties and interest should be disallowed by reason of DOR failing to adopt rules for dealing with settlements. Although Section 213.21(5) has been in effect since October 1981 and DOR has only developed a proposed rule respecting settlements, it is appropriate to consider the language in *McDonald vs. Dept. of Banking and Finance*, 346 So.2d 569, 581 (Fla. 1st DCA 1977) that:

While the Florida APA thus requires rulemaking for policy statements of *general applicability*, it also recognizes the inevitability and desirability of refining incipient agency policy through adjudication of individual cases. There are quantitative limits to the detail of policy that can effectively be promulgated as rules or assimilated; and even the agency that *knows* its policy may wisely sharpen its purposes through adjudication before casting rules.

Furthermore, in *Barker vs. Board of Medical Examiners, Dept. of Prof. Reg.*, 428 So.2d 720 (Fla. 1st DCA 1982), the Court stated:

The fact, however, that no rule was extant at the time Barker applied for a licensure does not necessarily mean the Board's action was void. The time has long since passed (if it ever existed) that agency action was mechanically invalidated simply because no rule

was in effect. . . . Our academic endeavors in attempting to label the action either rule or nonrule to determine whether or not it fell within section 120.52(14)'s definition of a rule have now been largely discarded. There are, however, costs exacted upon an agency which avoids the rulemaking procedure provided by section 120.54, chief among those being that the agency may be required repeatedly to defend its nonrule policy decisions in each case. *State, Dept. of Administration vs. Harvey*, 356 So.2d 323, 326 (Fla. 1st DCA 1977).

Applying these principles to the facts stipulated in the instant proceeding we have no rule in effect and the agency is required to defend its policy decisions regarding mitigating or compromising penalties and interest. Absent rules providing the agency's interpretation of the statute in question, we must turn to the statute itself for guidance.

Section 199.282, *Florida Statutes*, provides in pertinent part:

If any annual or non-recurring tax is not paid by the statutory due date, then despite any extension granted under s. 199.232(6), interest shall run on the unpaid balance from such due date until paid at the rate of 12 percent per year.

(3) If any annual or non-recurring tax is not paid or if an annual tax return is not filed by the due date, a delinquency penalty shall be charged. The delinquency penalty shall be 5 percent of the delinquent tax for each calendar month or portion thereof from the due date until paid, up to a limit of 25 percent of the total tax not timely paid.

(4) If an annual tax return is filed and property is either omitted from it or undervalued, then a specific penalty shall be charged. The specific penalty shall be 15 percent of the tax attributable to each omitted

item or to each undervaluation. No delinquency or late filing penalty shall be charged with respect to any underevaluation.

In each of the sections above quoted the mandatory "shall" is used with respect to assessing the penalties. However, Section 213.21(3) authorizes DOR to mitigate a taxpayer's liability for penalties which may be settled or compromised if it is determined that the noncompliance is due to reasonable cause and not to willful negligence, willful neglect, or fraud. Here the word "may" is used which allows DOR discretion in compromising penalties. Since DOR has such discretion its decision to not compromise may be overturned only upon clear evidence that DOR abused its discretion. If FMCC's failure to pay tax on these intangibles above discussed was reasonable, then the DOR is authorized, but not directed, to mitigate the penalty.

The fundamental rule of construction is that tax laws are to be construed strongly in favor of the taxpayer and against the government and that all ambiguities are to be resolved in favor of the taxpayer, *Maas Brothers, Inc. vs. Dickinson*, 195 So.2d 193 (Fla. 1973); but exemptions to taxing statutes are special favors granted by the Legislature and are to be strictly construed against the taxpayer. *State ex rel Szabo Food Services vs. Dickinson*, 286 So.2d 529 (Fla. 1973). Mitigation of penalties is a favor authorized by the Legislature. Applying this principle to the instant case leads to the conclusion that FMCC has the burden of proving that its action in not paying the taxes here in issue was reasonable and not due to willful negligence, willful neglect or fraud. This it has failed to do.

Finally, FMCC contends that DOR is estopped from collecting interest and penalties. This is based upon FMCC reporting its intangibles in the same manner during the period 1973 through 1982, and the fact that DOR not only audited those returns, but challenged and abandoned the challenge to FMCC's method, and that because this method was accepted in the initial 1980 audit, DOR is estopped from collecting the interest and penalties here demanded. In *State, Dept. of Revenue vs. Anderson*, 403 So.2d 397 (Fla. 1981), the Court stated:

As a general rule equitable estoppel will be applied against the state only in rare instances and under exceptional circumstances. *North American Co. vs. Green*, 120 So.2d 603 (Fla. 1959). Another general rule is that the state cannot be estopped through mistaken statements of the law. *Department of Revenue vs. Hobbs*, 368 So.2d 345 (Fla. 1st DCA), *appeal dismissed*, 378 So.2d 345 (Fla. 1979); *Austin vs. Austin*, 350 So.2d 102 (Fla. 1st DCA 1977); *cert. denied*, 357 So.2d 184 (Fla. 1978). In order to demonstrate estoppel, the following elements must be shown: (1) a representation as to a material fact that is contrary to a later asserted position; (2) reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon. *Greenhut Constr. Co. vs. Henry A. Knott, Inc.*, 247 So.2d 517 (Fla. 1st DCA 1971).

FMCC failed to show the existence of these elements. Even though the initial audit of FMCC's 1980 intangible tax return did not challenge this return, this hardly constitutes a representation that the return is factually correct and similar later returns cannot be challenged. But even if Petitioner had satisfied the first two elements,

there has been no showing that FMCC changed its position to its detriment which is necessary before a claim of estoppel can be made.

From the foregoing, it is concluded that FMCC owes \$1,226,045, plus \$486,369 interest as of 7/20/84, and \$543,968 in penalties for underpayment of intangible taxes for the tax years 1980 1982. It is

ORDERED that the Department of Revenue enter this Final Order finding FMCC owes \$1,226,045 for underpaid intangible taxes for the tax years 1980 - 1982, plus interest to date of payment plus penalties in the amount of \$543,968.

DONE AND ENTERED this 19th day of November, 1987, at Tallahassee, Leon County, Florida.

/s/ Randy Miller
RANDY MILLER
EXECUTIVE DIRECTOR
DEPARTMENT OF REVENUE
STATE OF FLORIDA

I hereby certify that a true and correct copy of the above Final Order was entered in the records of the Department of Revenue this 19th day of November, 1987.

/s/ Mary L. Ford
Agency Clerk

SUPREME COURT OF FLORIDA

WEDNESDAY, FEBRUARY 22, 1989

FORD MOTOR CREDIT)	
COMPANY,)	
Petitioner,)	CASE NO. 73,238
v.)	District Court
DEPARTMENT OF)	of Appeal,
REVENUE,)	First District No.
Respondent.)	87-2036

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, Acting C.J., BARKETT, GRIMES and KOGAN, JJ., concur MCDONALD, J., dissents

A True Copy	cc: Hon. Raymond E. Rhodes,
TEST: (SEAL)	Clerk
/s/ Sid J. White	James E. Tribble, Esquire
Sid J. White	J. C. O'Steen, Esquire
Clerk Supreme	Jeffrey M. Dikman, Esquire
Court.	

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M A N D A T E

From

DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

To the Honorable, the Randy Miller
Executive Director

WHEREAS, in that certain cause filed in this Court
styled:

FORD MOTOR CREDIT
CORPORATION

v.

DEPARTMENT OF
REVENUE,
STATE OF FLORIDA

Case No. 87-2036
Your Case No. 85-1303

The attached opinion was rendered on September 13,
1988, YOU ARE HEREBY COMMANDED that further
proceedings be had in accordance with said opinion, the
rules of this Court and the laws of the State of Florida.

WITNESS the Honorable Larry G. Smith

Chief Judge of the District Court of Appeal of
Florida, First District and the Seal of said court at Tal-
lahassee, the Capitol, on this 14th day of November, 1988.

(SEAL)

/s/ Raymond E. Rhodes
Clerk, District Court of
Appeal of Florida,
First District

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DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

October 12, 1988

CASE NO. 87-02036

L.T. CASE NO. 85-1303

Ford Motor Credit v. Department of Revenue,
Corporation State of Florida

Appellant(s),

Appellee(s).

ORDER

Motion for rehearing and clarification DENIED.

By order of the Court

RAYMOND E. RHODES
CLERK

I HEREBY CERTIFY that a true and correct copy of the
above was mailed this date to the following:

cc: Douglas H. Stein
James E. Tribble J. C. O'Steen
Jeffrey M. Dikman /s/ Karen Roberts
(SEAL) Deputy Clerk

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

Case No. 87-2036

FORD MOTOR CREDIT
COMPANY,

Appellant,

vs.

DEPARTMENT OF REVENUE,
STATE OF FLORIDA,

Appellee.

NOTICE OF APPEAL

° NOTICE IS HEREBY GIVEN that FORD MOTOR CREDIT COMPANY, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the District Court of Appeal, First District, State of Florida, filed and entered September 13, 1988, motion for rehearing and clarification denied October 12, 1988; discretionary review denied by Supreme Court of Florida on February 22, 1989, which judgment of the District Court of Appeal affirmed an order of the Department of Revenue that appellant owed certain intangible taxes, penalties and interest, and held that Chapter 199, Florida Statutes, the Intangible Personal Property Tax Act, does not violate the commerce clause of the United States Constitution.

This appeal is taken pursuant to 28 U.S.C. §1257(2), as that section existed prior to the amendment enacted by Public Law 100-352 §3, 7, June 27, 1988, 102 Stat. 662, 664, which amendment preserved unaffected the right of the

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Supreme Court to review and the manner of reviewing a judgment or decree, such as this one, entered before the effective date of the amendment, which was September 25, 1988.

By /s/ James E. Tribble
James E. Tribble
Counsel for Appellant

BLACKWELL, WALKER,
FASCELL & HOEHL
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
Telephone: (305) 358-8880

PROOF OF SERVICE

I, JAMES E. TRIBBLE, one of the counsel of record for FORD MOTOR CREDIT COMPANY, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 4th day of April, 1989, I served copies of the foregoing notice of appeal on the Department of Revenue, State of Florida, by mailing one copy each in a duly addressed envelope, with first-class postage prepaid, to J. C. O'Steen and Jeffrey M. Dikman, Assistant Attorneys General, the Capitol - Tax Section, Tallahassee, Florida 32399-1050.

It is further certified that all parties required to be served have been served, and that the only such party is the Department of Revenue, State of Florida.

By /s/ James E. Tribble
James E. Tribble
Attorney for FORD MOTOR
CREDIT COMPANY

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BLACKWELL, WALKER,
FASCELL & HOEHL
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
Telephone: (305) 358-8880

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DOCKET NO. 87-2036

LRB
April 5, 1989
Date

Ford Motor Credit vs Dept. of Revenue,
Company State of Florida

THIS ACKNOWLEDGES RECEIPT OF THE FOLLOW-
ING IN THE ABOVE STYLED CAUSE:

☒ Notice of Appeal with /without filing fee. To
U.S. Supreme Court
____ Petition for _____
with / without filing fee.
____ Motion for extension of time
 ___ Appellant
 ___ Appellee
____ Brief of Appellant
____ Brief of Appellee
____ Brief of Amicus Curiae
____ Reply brief
 ___ Request for oral argument
 ___ Motion for attorney's fees
____ Docketing Statement
____ Appendix to brief
____ Record on appeal
____ Notice of supplemental authority
____ Notice of voluntary dismissal
____ Notice to Invoke Discretionary Jurisdiction
with / without filing fee
____ Motion for _____

/s/ Laurie Black
Deputy Clerk
District Court of Appeal
First District

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

Case No. 87-2036

FORD MOTOR CREDIT COMPANY,	:	Received
Appellant,	:	APR 5 1989
vs.	:	OFFICE OF GEN- ERAL COUNSEL
DEPARTMENT OF REVENUE, STATE OF FLORIDA,	:	DEPARTMENT OF REVENUE
Appellee.	:	
_____	:	

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that FORD MOTOR CREDIT COMPANY, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the District Court of Appeal, First District, State of Florida, filed and entered September 13, 1988, motion for rehearing and clarification denied October 12, 1988; discretionary review denied by Supreme Court of Florida on February 22, 1989, which judgment of the District Court of Appeal affirmed an order of the Department of Revenue that appellant owed certain intangible taxes, penalties and interest, and held that Chapter 199, Florida Statutes, the Intangible Personal Property Tax Act, does not violate the commerce clause of the United States Constitution.

This appeal is taken pursuant to 28 U.S.C. §1257(2), as that section existed prior to the amendment enacted by Public Law 100-352 §3, 7, June 27, 1988, 102 Stat. 662, 664, which amendment preserved unaffected the right of the

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Supreme Court to review and the manner of reviewing a judgment or decree, such as this one, entered before the effective date of the amendment, which was September 25, 1988.

By /s/ James E. Tribble
James E. Tribble
Counsel for Appellant
BLACKWELL, WALKER,
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Miami, Florida 33131
Telephone: (305) 358-8880